

OPEN MEETING ITEM

COMMISSIONERS
BOB STUMP – Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH



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ARIZONA CORPORATION COMMISSION

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DATE:

OCTOBER 21, 2014

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DOCKET NO.:

T-01051B-05-0495 AND T-03693A-05-0495

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

TO ALL PARTIES:

ORIGINAL

Enclosed please find the recommendation of Administrative Law Judge Jane L. Rodda. The recommendation has been filed in the form of an Order on:

PAC-WEST TELECOMM, INC. VS. QWEST CORPORATION
(COMPLAINT)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

OCTOBER 30, 2014

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

NOVEMBER 5, 2014 AND NOVEMBER 6, 2014

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

Arizona Corporation Commission

DOCKETED

OCT 21 2014

DOCKETED BY

A handwritten signature in black ink, appearing to read "Jodi Jerich".

JODI JERICHER
EXECUTIVE DIRECTOR

1200 WEST WASHINGTON STREET; PHOENIX, ARIZONA 85007-2927 / 400 WEST CONGRESS STREET; TUCSON, ARIZONA 85701-1347

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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

3 BOB STUMP - Chairman
4 GARY PIERCE
5 BRENDA BURNS
6 BOB BURNS
7 SUSAN BITTER SMITH

8 PAC-WEST TELECOMM, INC.

9 Complainant,

10 vs.

11 QWEST CORPORATION,

Respondent.

DOCKET NO. T-01051B-05-0495
DOCKET NO. T-03693A-05-0495

DECISION NO. _____

ORDER

12 Open Meeting
13 Phoenix, Arizona
14 November 5 & 6, 2014

15 **BY THE COMMISSION:**

16 * * * * *

17 Having considered the entire record herein and being fully advised in the premises, the
18 Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

19 **FINDINGS OF FACT**

20 1. On July 13, 2005, Pac-West Telecomm, Inc. ("Pac-West") filed a formal complaint
21 with the Commission against Qwest Corporation ("Qwest" now known as "Qwest Corporation dba
22 CenturyLink") seeking to enforce an Interconnection Agreement between the parties. The dispute
23 was whether Qwest was required to pay reciprocal compensation to Pac-West for terminating Internet
24 Service Provider ("ISP") traffic, including VNXX traffic.¹ Qwest made counterclaims, alleging that
25 use of VNXX was not permitted and that the traffic in question was not subject to the FCC's
26 compensation rate for ISP-bound traffic.

27 _____
28 ¹ VNXX traffic does not physically originate and terminate in the same local calling area, but based on the phone number assigned, appears to do so from the perspective of the calling party.

1 2. In Decision No. 68820 (June 29, 2006) the Commission found that Qwest must
2 compensate Pac-West for ISP traffic regardless of whether it physically originated and terminated in
3 the same local calling area. Qwest appealed the Decision to the United States District Court of
4 Arizona ("District Court").

5 3. On March 6, 2008, the District Court determined that the billing disputes could not be
6 resolved without deciding the nature of VNXX traffic, and issued an order that remanded the matter
7 back to the Commission to determine whether VNXX traffic was local traffic subject to reciprocal
8 compensation, interexchange traffic subject to access charges, or traffic subject to some other form of
9 intercarrier compensation.

10 4. On July 25, 2008, Qwest filed a "Notice of Final Order and Remand" and a Motion for
11 Judgment Pursuant to Mandate ("Motion"). Qwest sought to have the Commission vacate provisions
12 of Decision No. 68820, which Qwest claimed were enjoined by the Order of the District Court and
13 requested that the Commission order Pac-West to refund Qwest the amount of \$1,849,153.22, which
14 Qwest had paid to Pac-West pursuant to Decision No. 68820.

15 5. On August 11, 2008, Pac-West filed a Response to Qwest's Motion, arguing that
16 Qwest's requested relief was inconsistent with the District Court's Order, which Pac-West claimed
17 was to determine the most appropriate compensation regime for VNXX traffic before determining
18 which party prevails in the dispute.

19 6. On August 22, 2008, Qwest filed a Reply to Pac-West's Response, arguing that the
20 Commission must first address and amend those portions of Decision No. 68820 that were vacated by
21 the District Court's Order, and only then would it be appropriate to decide how the Commission
22 should deal with VNXX.

23 7. By Procedural Order dated September 4, 2008, a Procedural Conference was
24 scheduled for September 25, 2008, to determine the appropriate process for resolving the dispute.
25 Qwest, Pac-West and the Commission's Utilities Division ("Staff") appeared through counsel at the
26 Procedural Conference.

27 8. By Procedural Order dated September 30, 2008, Qwest's Motion was denied and the
28 parties, including Staff, were directed to file position statements; a Procedural Conference was set for

1 November 17, 2008.

2 9. On November 5, 2008, the FCC released its Order on Remand concerning ISP-Bound
3 traffic.

4 10. Pac-West, Qwest and Staff appeared through counsel at the November 17, 2008,
5 Procedural Conference. Pac-West argued that the November 5, 2008 FCC Order resolved the matter
6 without the need for an evidentiary hearing, however Qwest disagreed about the impact to the FCC's
7 Order. By Procedural Order dated December 19, 2008, the parties were directed to file position
8 statements on the issue(s) of fact and law that they believed the Commission would need to resolve in
9 this matter; a Procedural Conference was set for January 21, 2009.

10 11. At the January 21, 2009 Procedural Conference, Pac-West continued to assert the
11 belief that the matter could be resolved by dispositive motion, while Qwest asserted that the matter
12 involved a mixed question of fact and law and that some kind of hearing would be required. By
13 Procedural Order dated January 21, 2009, a schedule for filing dispositive motions and responses was
14 established.²

15 12. On February 13, 2009, Pac-West filed a Motion for Summary Determination.

16 13. On April 9, 2009, Qwest and Staff filed their Responses to Pac-West's Motion for
17 Summary Disposition.

18 14. On April 30, 2009, Pac-West filed its Reply.

19 15. On June 1, 2009, Qwest filed a Notice of Supplemental Authority in Support of Its
20 Response, attaching two briefs filed by the FCC which it believed supported its position.

21 16. On June 11, 2009, Pac-West filed a Response to Qwest's Supplemental Authority.

22 17. By Procedural Order dated September 17, 2009, Pac-West's Motion for Summary
23 Disposition was denied on the grounds that there were issues of fact about how Pac-West was using
24 VNXX service and the parties' course of dealing. A Procedural Conference was ultimately set for
25 October 7, 2009.³

26 18. Qwest, Pac-West and Staff appeared through counsel at the October 7, 2009

27 ² On March 17, 2009, Qwest filed an unopposed request to modify the briefing schedule, which was granted by
Procedural Order dated March 20, 2009.

28 ³ Procedural Order dated October 1, 2009.

1 Procedural Conference, and all parties agreed that the proceedings in this docket should be suspended
2 pending the decision of the United States Ninth Circuit Court of Appeals in a substantially similar
3 dispute between Qwest and Level 3 Communication, LLC ("Level 3"). The Pac-West Docket was
4 suspended by Procedural Order dated October 30, 2009.

5 19. The Ninth Circuit remanded the Level 3 matter back to the Commission on April 19,
6 2010.

7 20. On June 3, 2010, Pac-West filed in this Docket, a Response to a Motion for Joint
8 Procedural Conference filed by Level 3 in Docket Nos.T-03654A-05-0405 and T-01051B-05-0415.

9 21. By Procedural Order dated June 8, 2009, a Procedural Conference was set for July 8,
10 2010, to address how to resolve both the Level 3 and Pac-West remands. Qwest, Level 3, Pac-West
11 and Staff appeared through counsel for the July 8, 2010 Procedural Conference. By Procedural Order
12 dated August 23, 2010, the Pac-West and Level 3 remands were consolidated and a briefing schedule
13 was set.

14 22. On October 1, 2010, Qwest, Pac-West, Level 3, and Staff filed their initial briefs, and
15 on November 11, 2010, filed their Responsive Briefs. Pac-West filed a Request for Oral Argument on
16 December 8, 2010, which was joined by Level 3 on December 9, 2010. On December 22, 2010,
17 Qwest filed a request that a ruling on oral argument await the issuance of an order in the pending
18 parallel proceeding in Washington State.

19 23. By Procedural Order dated January 19, 2011, it was determined that it was appropriate
20 to proceed because any resolution in Washington was not binding on the Arizona proceeding and
21 there was no indication when Washington might act; oral argument was set for February 22, 2011.
22 Thereafter, Qwest, Level 3 and Pac-West filed a series of requests to continue the oral argument
23 while they engaged in settlement discussions. Ultimately, the hearing for oral argument was vacated
24 and the parties directed to file a request for a new hearing date when and if needed.⁴

25 24. On December 16, 2011, Joan Burke, counsel for Pac-West filed a Request to
26 Withdraw as Counsel after Pac-West announced a merger with UniPoint Holdings Corp. on
27

28 ⁴ See Motions to Continue filed February 14, 2011, April 11, 2011, June 3, 2011, and August 19, 2011, and Procedural Orders dated February 14, 2011, April 15, 2011, June 7, 2011 and August 23, 2011.

1 September 7, 2011, and thereafter failed to communicate with Ms. Burke. By Procedural Order dated
2 December 30, 2011, the Request to Withdraw was taken under advisement pending Pac-West's
3 demonstration of its compliance with Rules 31 and 38 of the Rules of the Arizona Supreme Court and
4 A.R.S. §40-243 concerning representation before the Commission. On February 1, 2012, Mr. Craig
5 Marks filed Notice of Substitution of Counsel on behalf of Pac-West. By Procedural Order dated
6 February 10, 2012, Ms. Burke's withdrawal as counsel for Pac-West was granted.

7 25. On March 3, 2012, Qwest filed a Motion for Order Setting Hearing, requesting a
8 hearing date in May 2012.

9 26. By Procedural Order dated March 19, 2012, a hearing for the purpose of oral argument
10 was set for May 18, 2012, with any supplements to the parties' legal arguments to be filed by May
11 10, 2012.⁵ By Procedural Order dated May 14, 2012, oral argument was continued until June 12,
12 2012, and the deadline for filing supplemental authority extended until June 4, 2012.

13 27. On June 4, 2012, Qwest, Pac-West and Level 3 filed Supplemental Authority and
14 Supplemental Arguments.

15 28. The hearing for oral argument convened on June 12, 2012, before a duly authorized
16 Administrative Law Judge. Pac-West, Level 3, Qwest, and Staff appeared through counsel. At the
17 conclusion of the hearing, the matter was taken under advisement.

18 29. On January 16, 2013, Qwest and Level 3 filed a Joint Notice that they were engaged in
19 discussions that potentially would resolve the disputes between them. On February 11, 2013, Qwest
20 and Level 3 filed a Joint Notice of Settlement and Joint Motion to sever the consolidated Dockets and
21 to dismiss the Level 3 Dockets (i.e. Docket Nos. T-03654-05-0415 and T-01051B-05-0415).

22 30. On April 4, 2013, Pac-West filed Notice of Bankruptcy, indicating that it filed for
23 relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, Western
24 District of Texas, Austin Division, Case Number 13-10573-hcm.

25 31. By Procedural Order dated April 16, 2014, the Level 3 dockets were severed from the
26

27 ⁵ On April 30, 2012, Level 3 requested that procedural issues regarding a future evidentiary hearing also be addressed at
28 the May 18, 2012 hearing. On May 4, 2012, Pac-West requested a brief continuance of the oral argument to accommodate
the schedules of the Pac-West and Level 3 attorneys to which Qwest did not object. On May 8, 2012, Staff requested
additional time to file supplemental authority.

1 Pac-West dockets, the Level 3 complaint was dismissed and the Level 3 dockets administratively
2 closed.

3 32. By Procedural Order dated April 19, 2013, the remaining parties and Staff were
4 directed to file comments on the effect of the Pac-West bankruptcy and whether the automatic stay
5 under the Bankruptcy Code would prevent the Commission from issuing an Opinion and Order in the
6 matter.

7 33. On May 10, 2013, Staff and Qwest filed Comments; on May 13, 2013, Pac-West filed
8 its Comments. Pac-West stated that the portion of the proceeding that sought to enforce a money
9 judgment against Pac-West was stayed in its entirety by the automatic stay provisions of the
10 Bankruptcy Code, and requested that the proceeding be abated for six months. Qwest argued that
11 Pac-West's bankruptcy filing did not automatically stay all proceedings in this docket to enforce
12 the Interconnection Agreement between the parties, but agreed that its counterclaims against Pac-
13 West were stayed. Staff stated that the language of the automatic stay clearly provides that the
14 stay is applicable only to actions "against" the debtor and that most courts have held that the stay
15 is not applicable to offensive actions by the debtor.

16 34. By Procedural Order dated July 10, 2013, it was determined that it appeared that the
17 automatic stay would not prevent the Commission from determining the proper classification of
18 VNXX traffic, but that the Commission would be stayed from taking any action to determine Qwest's
19 counterclaims against Pac-West. Thus, for practical reasons, and with the consensus of the parties, it
20 was determined not to take further action in the Docket until requested by either party. Pac-West was
21 directed to file periodic status reports when there was a significant development in the bankruptcy
22 court.

23 35. On September 24, 2013, Craig Marks, counsel for Pac-West filed a Request to
24 Withdraw as Counsel. In his filing, Mr. Marks stated that it was his belief that TNCI Operating
25 Company LLC ("TNCI") was going to purchase Pac-West out of bankruptcy, with the acquisition
26 expected to close the week of September 9, 2013. Counsel reported that neither Pac-West nor its
27 counsel responded to his e-mails, and that he was not retained as counsel by TNCI. Counsel stated
28 further that he provided notice to Pac-West that he was withdrawing as Pac-West's counsel.

1 36. Between September 24, 2013 and August 3, 2014, there were no filings made in the
2 docket. By Procedural Order dated August 4, 2014, the parties were requested to update the status of
3 the matter.

4 37. On September 11, 2014, Qwest filed a Status Report and Procedural
5 Recommendation. Qwest reported that in the Pac-West bankruptcy, it and Pac-West ultimately
6 reached an agreement that was approved by the Bankruptcy Court on August 5, 2013. That agreement
7 provided for the assignment of the interconnection agreement between Pac-West and Qwest to TNCI
8 and for Pac-West to release all claims it had or may have against CenturyLink or Qwest, including
9 the billing disputes that were the basis of the Pac-West Complaint filed with the Commission.⁶

10 38. In its September 11, 2014 Status Report, Qwest also noted that on August 1, 2013,
11 TNCI applied to the Commission for approval of the transfer of Pac-West's assets and customer base
12 to TNCI, which was approved in Decision No. 74153 (October 25, 2013).⁷ Pac-West's Chapter 11
13 Plan was approved by the Bankruptcy Court on March 27, 2014, and the Plan became effective on
14 July 1, 2014. According to Qwest, pursuant to the Plan, Pac-West transferred its remaining assets to
15 a liquidating trust and ceased to operate. Commission records indicate that Pac-West has not
16 maintained good corporate standing in Arizona, and Qwest asserts that for all intents and purposes,
17 Pac-West no longer exists. Qwest states that based on these circumstances, including the fact that the
18 parties settled the issues raised in this Docket, the claims and counterclaims in this Docket should be
19 dismissed and the Docket closed.

20 39. On September 30, 2014, Staff filed Staff's Status Report and Procedural
21 Recommendations. Based on the history of this matter, and Qwest's representations that the issues
22 raised by the parties in the Docket have been settled pursuant to Bankruptcy Court Order, Staff
23 recommended that the Commission dismiss the claims and counterclaims with prejudice and close the
24 Docket. Staff further recommended, in a footnote, that out of an abundance of caution, since TNCI is
25 not a party to the Docket, that the Commission could give TNCI notice of Staff's and Qwest's
26 recommended disposition and 20 days to confirm that there are no outstanding issues or claims and

27 ⁶ Qwest attached to its Status Report a copy of the Bankruptcy Court's Order dated August 5, 2013 which memorializes
28 the agreement between Pac-West and Qwest.

⁷ Docket Nos. T-20882A-13-0262 and T-03693A-13-0262.

1 that the complaint should be dismissed with prejudice.⁸

2 40. On October 10, 2014, Qwest filed a Response to Staff's Status Report. Qwest objected
3 to the recommendations that TNCI be given notice on the grounds that such action is improper and
4 unnecessary because TNCI is not a party to the Docket, nor is it a successor or assign of Pac-West's
5 claims in the Docket. In addition, Qwest asserted that it purposefully did not seek dismissal "with
6 prejudice" and that dismissal "without prejudice" is important to avoid any impact of the settlement
7 on third parties if questions of law raised in this Docket, but not being decided, should arise in the
8 future. Qwest argues that a dismissal without prejudice best serves the situation.

9 41. No response to the August 4, 2014 Procedural Order requesting recommendations was
10 received from Pac-West or TNCI.

11 42. The parties have had opportunity to pursue their claims in this matter. The record
12 indicates that Qwest and Pac-West resolved and released their billing claims without having to
13 adjudicate the underlying legal merits involving the use of VNXX. Dismissal without prejudice is
14 not an adjudication on the merits of a claim, does not affect the rights or remedies of the parties, and
15 does not bar a subsequent complaint on the same cause of action. In a dismissal without prejudice, in
16 the event that a third party, including TNCI, might in the future have an interest in the substantive
17 issues raised as part of this proceeding, it would retain the right to raise those issues before the
18 Commission. Thus, we find that the claims and counterclaims should be dismissed without prejudice.

19 43. Although not party to the underlying complaint, a copy of the Recommended Opinion
20 and Order issued in this matter will be sent to counsel of record for TNCI. The time for filing
21 comments or exceptions will not be extended, nor is any determination made at this time that TNCI
22 has standing to raise any issues in this Docket.

23 CONCLUSIONS OF LAW

24 1. Pac-West and Qwest are public service corporations under Article XV of the Arizona
25 Constitution and under Arizona Revised Statutes, Title 40, generally.

26 2. The Commission has jurisdiction over the parties.

27
28 ⁸ Staff included TNCI on the service list of its Status Report.

3. Notice of the proceeding was provided in accordance with applicable law.

4. The issues that formed the basis of the complaint and counterclaims between Pac-West and Qwest have been resolved and dismissing this matter and administratively closing the Docket are in the public interest.

ORDER

IT IS THEREFORE ORDERED that Pac-West Telecomm, Inc.'s and Qwest Corporation dba CenturyLink's claims and counter-claims raised in this Docket are hereby dismissed without prejudice and the Docket shall be administratively closed.

IT IS FURTHER ORDERED that the request to withdraw as counsel for Pac-West Telecomm, Inc. filed by Mr. Marks is granted.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, JODI JERICH, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this _____ day of _____ 2014.

JODI JERICH
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____
JR:ru

SERVICE LIST FOR:

PAC-WEST TELECOMM, INC. VS. QWEST CORPORATION

DOCKET NOS.:

T-01051B-05-0495 AND T-03693A-05-0495

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